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COMMENTS

A BETTER *TWIN RIVERS*: A REVISED APPROACH TO STATE ACTION BY COMMON-INTEREST COMMUNITIES

Evelyn C. Lombardo⁺

Nearly fifty-nine million Americans live in private common-interest communities, governed by member-elected governing boards or associations.¹ Residential associations create rules that influence various aspects of suburban life, from landscaping and exterior paint colors to the posting of political signs.² Residents generally welcome regulations that community associations promulgate because such rules create and maintain the atmosphere and

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1. See CMTY. ASS'NS INST., DATA ON U.S. COMMUNITY ASSOCIATIONS, <http://www.caionline.org/about/facts.cfm> (last visited Jan. 21, 2008). The Restatement defines a common-interest community as

a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal

(a) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or

(b) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.

RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 (2000).

2. See Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 611–12 (1993) (noting that associations typically restrict the exterior aesthetics of private property that otherwise “might result in unreasonable annoyances to persons beyond the boundaries of the private property”); see also Paula A. Franzese, *Privatization and Its Discontents: Common-interest Communities and the Rise of Government for “the Nice”*, 37 URB. LAW. 335, 336–37 (2005) (“Covenants have been devised to regulate everything from whether pets are permitted, what the maximum weight of an allowed pet must be, the permissibility and, if permitted, the design of one's doghouse and birdhouse, the precise contours of landscaping content and style, the architectural style of one's home, the color of one's home, the color of one's shutters, the color of one's interior drapes, the permissibility of screen doors, the posting of signs, and even the propriety of wok-cooking.” (footnotes omitted)).

lifestyle³ that attracted the residents in the first place.⁴ In some instances, however, common-interest community residents encounter regulations that restrict political speech,⁵ and appear to suspend certain constitutional rights within these otherwise idyllic, often gated, communities.⁶ This situation gives rise to the current legal debate: whether common-interest communities may be classified as state actors.⁷

Some commentators argue that common-interest communities and their member-elected boards are essentially state or public actors by virtue of their

3. See generally David L. Callies, Paula A. Franzese & Heidi Kai Guth, *Ramapo Looking Forward: Gated Communities, Covenants, and Concerns*, 35 URB. LAW. 177, 183 (2003) (asserting that “gated communities in the United States fall into one of three categories: so called ‘lifestyle communities, prestige communities, and security zone communities’” (quoting EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 1–3 (1997))).

4. Cf. Laura T. Rahe, Comment, *The Right to Exclude: Preserving the Autonomy of the Homeowners’ Association*, 34 URB. LAW. 521, 524 (2002) (“[D]evelopers establish a homeowners’ association’s restrictive covenants bearing in mind that the covenants will affect the desirability, and hence the value of the property.”). Because association regulations are typically benign, courts generally employ non-constitutional standards of review, including the business judgment rule and the reasonableness test. Ronald L. Perl, *Legal Standards by Which Community Association Boards are Judged*, N.J. LAW. Oct. 2006, at 41–44. These standards examine whether the regulation is authorized by the community’s governing documents and whether the regulation is unconscionable or unreasonable. *Id.* at 43.

5. See Lisa J. Chadderdon, *No Political Speech Allowed: Common-Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVT. L. 233, 234 (2006) (“Such bars can, and often do, include a prohibition on all campaign signs, political banners and fliers, and even on displaying the American flag.”).

6. See Adrienne Iwamoto Suarez, *Covenants, Conditions, and Restrictions . . . On Free Speech? First Amendment Rights in Common-Interest Communities*, 40 REAL PROP. PROB. & TR. J. 739, 741 (2006).

7. See, e.g., Lara Womack & Douglas Timmons, *Homeowner Associations: Are They Private Governments?*, 29 REAL EST. L.J. 322, 329 (2001) (describing the lawsuit filed on behalf of homeowners against a homeowners’ association, in which the homeowners alleged that the association is akin to a state actor). As a general rule, the federal Constitution’s Bill of Rights does not protect individuals from conduct by private organizations or actors. *Id.* (“In the absence of statutes, the Constitution’s individual rights provisions usually do not protect people from the acts of private parties.”). Because the Fourteenth Amendment prohibits only state action, any infringement upon federal constitutional rights by a private actor is per se outside the scope of the Fourteenth Amendment. Suarez, *supra* note 6, at 744. Despite the per se rule, when private organizations engage in governmental activity, courts may assume state action, applying constitutional principles to private entities. See David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 778 (1995) (discussing use of the state action doctrine to remedy violations of the Fourteenth Amendment when “ostensibly private conduct takes on a public character”). Moreover, courts engage in case-specific factual analysis when determining whether particular challenged activity represents a private or a state action. Cf. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972) (“[T]he question of whether particular discriminatory conduct is private, on the one hand, or amounts to ‘state action,’ on the other hand, frequently admits of no easy answer ‘only by sifting and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance.’”).

regulatory and assessment capacities.⁸ Others argue that community associations are essentially private organizations, in which members simply purchase individual lots or units burdened by servitudes.⁹ The foregoing public-versus-private distinction is significant because the Fourteenth Amendment (which makes most of the Bill of Rights applicable to the states) prohibits only state action.¹⁰ In particular, this Comment examines the New Jersey courts' struggle to develop an appropriate analogy to characterize community associations. About one million New Jersey residents live in private communities.¹¹ As a result, New Jersey courts have served as a hotbed of litigation among discontented residents and their governing boards.¹²

8. See, e.g., Kennedy, *supra* note 7, at 778 (“[F]unctions served by associations and their interdependent relationships with local governments transform their basic nature from private to public, such that they should be regarded as state actors.”); Womack & Timmons, *supra* note 7, at 327 (“The private communities have become a vehicle for shifting responsibility, financial and otherwise, away from municipalities. Some municipalities have seen this as an opportunity to shed the financial pressures associated with infrastructure costs and providing community services, and have encouraged the development of such communities. By doing so, the municipalities are abdicating to the homeowner associations the authority to act in ways that potentially intrude upon individual rights.”). Commentators suggest that community associations exercise a variety of quasi-municipal powers. See Womack & Timmons, *supra* note 7, at 330; see also Hyatt & Stubblefield, *supra* note 2, at 601. For example, a common-interest community's board may regulate the use and enjoyment of community common areas, as well as individually owned property. See Hyatt & Stubblefield, *supra* note 2, at 609–10. Associations often set and collect assessments, regulate land use and aesthetics, enforce use restrictions, and conduct periodic elections. *Id.* at 611–15. Many residential associations also provide services, including individual and common services. *Id.* at 618–19.

9. See, e.g., Rahe, *supra* note 4, at 521 (arguing that for members to realize the benefits of restricted communities, courts must uphold the private nature of homeowners' associations). Servitudes or covenants obligate the owner to pay assessments associated with maintenance of common property and other facilities, or to support the activities of an association. See WAYNE S. HYATT, CONDOMINIUMS AND HOMEOWNER ASSOCIATIONS: A GUIDE TO THE DEVELOPMENT PROCESS 7–8 (3d ed. 2000); see also Hyatt & Stubblefield, *supra* note 2, at 612–13. In addition, most common-interest communities require automatic mandatory enrollment in an association of property owners upon purchase. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. a (2000). Other authors argue that community associations are essentially private in nature because members voluntarily agree, via contract, to pay fees and abide by association regulations. See, e.g., Rahe, *supra* note 4, at 522 (noting the contractual and private nature of homeowners' associations).

10. See Womack & Timmons, *supra* note 7, at 329; see also *supra* note 7.

11. See Associated Press, *N.J. High Court: Homeowners Must Abide By Association Rules*, FIRST AMENDMENT CENTER, July 27, 2007, <http://www.firstamendmentcenter.org/news.aspx?id=18850>.

12. See, e.g., Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1063 (N.J. 2007). In 1995, the New Jersey General Assembly appointed the Task Force to Study Homeowners' Associations. ASSEMBLY TASK FORCE TO STUDY HOMEOWNERS' ASSOCIATIONS 1 (1998), available at <http://www.njleg.state.nj.us/legislativepub/reports/homeown.pdf>. The Task Force held several public hearings throughout the state and was charged with “mak[ing] recommendations concerning the functions and powers of homeowners associations.” *Id.* (internal quotation marks omitted). In addition, legislation to reform state regulation of homeowners' associations is pending before the New Jersey State Senate and

In *Twin Rivers*, the New Jersey Supreme Court reversed a controversial decision by the Appellate Division of the New Jersey Superior Court, which recognized Twin Rivers' Homeowners' Association as a "public sector actor[.]"¹³ The New Jersey court was the first state appellate court in the country to apply state constitutional provisions to a private common-interest community.¹⁴ The superior court reasoned that the association's regulations governing the posting of political signs, prohibiting access to the community newsletter, and regulating assembly in the community room could potentially violate the state constitution's guarantee of free expression, and remanded the case for reconsideration in light of this standard.¹⁵ The New Jersey Supreme Court later reversed, reasoning that Twin Rivers Homeowners' Association was essentially private, and further, that the regulations at issue were reasonable with respect to time, place, and manner.¹⁶

This Comment will argue that, although the New Jersey Supreme Court properly characterized Twin Rivers' Homeowners' Association as a private actor, the court embraced an inappropriate public-forum standard in reaching its conclusion. First, this Comment will examine the development of the public-forum model and its ultimate rejection by the United States Supreme Court. It will discuss the public-forum approach adopted by a minority of states, including New Jersey. Part I will also examine approaches to the state action problem used by a majority of jurisdictions. Next, this Comment will address why various approaches to the state action issue are inadequate when evaluating common-interest communities. Then, this Comment explores a revised functional framework that would subject community associations to narrowly tailored constitutional liability. This pragmatic approach presents a much-needed solution to a growing problem, as more people choose to live in

General Assembly. See Common Interest Community and Homeowners' Association Act, S. 308, 213th Leg., 1st Annual Sess. (N.J. 2008); New Jersey Uniform Common Interest Ownership Act, A. 1991, 213th Leg., 1st Annual Sess. (N.J. 2008).

13. See *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 890 A.2d 947, 954 (N.J. Super. Ct. App. Div. 2006), *rev'd*, 929 A.2d 1060 (N.J. 2007). The superior court rejected the term "quasi municipal" and instead considered whether the activities at issue "are essentially in performance of public functions or impact with sufficient directness upon public interests to call into play the constitutional limitations that classically apply to public sector actors." *Id.* at 954–55.

14. See American Civil Liberties Union of New Jersey, *ACLU-NJ Lauds Landmark Free Speech Decision Regarding Homeowner Associations* (Feb. 7, 2006), <http://www.aclu-nj.org/pressroom/aclunjlaudslandmarkfreespe.html> ("For the first time anywhere in the United States, an appellate court has ruled that such private communities are 'constitutional actors' and must therefore respect their members' freedom of speech, explained Rutgers Law Professor Frank Askin, lead counsel in the case. 'The court recognized that just like shopping malls are the new public square, these associations have become and act, for all practical purposes, like municipal entities unto themselves,' he added.").

15. *Twin Rivers*, 890 A.2d at 959, 971.

16. See *Twin Rivers*, 929 A.2d at 1074.

common-interest communities each year.¹⁷ Further, this approach offers a middle ground between the public-versus-private dichotomy by recognizing community associations as public actors for limited purposes. Finally, this Comment concludes that a revised functional framework preserves the state action concept while safeguarding association residents against potential constitutional infringements.

I. THEORIES OF STATE ACTION: HOLDING PRIVATE ENTITIES TO CONSTITUTIONAL STANDARDS

Plaintiffs seeking to launch a federal constitutional challenge against a private individual or organization must allege state action:¹⁸ they must demonstrate that the activities of the private individual or organization are governmental or serve a public function.¹⁹ In the context of community association litigation, dissident residents seeking to challenge association regulations on the basis of the federal Constitution must demonstrate that the activities of their homeowners' association are governmental in nature.²⁰ A

17. See CMTY. ASS'NS INST., *supra* note 1. Developing a clear compromise is essential because more and more Americans are choosing to live in various private communities as evidenced by the following statistics:

Year	Communities	Housing Units	Residents
1970	10,000	701,000	2.1 million
1980	36,000	3.6 million	9.6 million
1990	130,000	11.6 million	29.6 million
2000	222,500	17.8 million	45.2 million
2002	240,000	19.2 million	48.0 million
2004	260,000	20.8 million	51.8 million
2005	274,000	22.2 million	54.6 million
2006	286,000	23.1 million	57.0 million
2007	295,700	23.8 million	58.8 million

Id.

18. See Suarez, *supra* note 6, at 744 (asserting that the Fourteenth Amendment, which incorporates most of the Bill of Rights including the First Amendment, prohibits only state action).

19. *Id.*; see also *supra* note 7.

20. See *supra* note 7; Suarez, *supra* note 6, at 744. When a party attempts to prove that community associations are state actors, competing interests are implicated. On one hand,

few states have embraced a lower threshold, asserting that their state constitutions do not expressly require state action as a basis for imposing constitutional liability.²¹ Those state courts make an exception and apply state constitutional provisions to private property that serves as a public forum.²² This Comment refers to the model above as the public-forum approach. Although the United States Supreme Court briefly ventured into public-forum jurisprudence, the Court ultimately corrected course.²³ A few states, including New Jersey, however, continue to follow this public-forum approach.²⁴

A. From Marsh to Hudgens: The Surge and Decline of the Public Forum

In a landmark decision, *Marsh v. Alabama*, decided in 1946, the United States Supreme Court opened the door to the recognition of private organizations as state actors.²⁵ In *Marsh*, the Court considered whether Chickasaw, a suburban Alabama town owned by the Gulf Shipbuilding Company (a private corporation), could prohibit a Jehovah's Witness from distributing religious literature while on company property.²⁶ In holding that the company owners could not deprive residents or visitors of the freedoms of press and religion, the Court highlighted Chickasaw's thriving shopping

residential associations seek to operate without interference from the State. *See, e.g.*, Hyatt & Stubblefield, *supra* note 2, at 589 ("The entity charged with enforcing these standards, the community association, provides the vehicle by which the home owners within the community govern themselves . . ."). On the other hand, property-owner members may perceive particular regulations as infringing on their basic freedoms. *See* Suarez, *supra* note 6, at 740–41 (noting the curtailment of First Amendment rights within common-interest communities).

21. *See, e.g.*, N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 775 (N.J. 1994) (finding a right based in the New Jersey Constitution to "leaflet" in a private shopping mall); Schmid v. State, 423 A.2d 615, 628 (N.J. 1980) ("[T]he rights of speech and assembly guaranteed by the state constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well."); *see also infra* note 57 (citing New Jersey, California, Massachusetts, and Washington as other minority jurisdictions).

22. *See J.M.B. Realty Corp.*, 650 A.2d at 771; *see also Schmid*, 423 A.2d at 627–28.

23. *See Hudgens v. NLRB*, 424 U.S. 507, 517–19 (1975) (discussing its foray into, and departure from, the public-forum approach).

24. *See J.M.B. Realty Corp.*, 650 A.2d at 775; *Schmid*, 423 A.2d at 628.

25. *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

26. *Id.* at 502–03. A Jehovah's Witness sought to distribute religious literature in Chickasaw's shopping district. *Id.* at 503. In the storefronts, the corporation had posted a notice which read: "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." *Id.* Appellant was warned she could not distribute such literature without a permit, and when she was asked to leave the sidewalk, she declined. *Id.* The deputy sheriff then arrested the woman and charged her with violating an Alabama statute that made it a crime to "enter or remain on the premises of another after having been warned not to do so." *Id.* at 503–04.

district and reasoned that the mining town resembled a municipality in all manners.²⁷

The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a “business block” on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town’s policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area.²⁸

Because Chickasaw displayed the characteristics of a typical town square, and because the Gulf Shipbuilding Company profited from public access to its company property, the Court extended First Amendment safeguards to visitors and inhabitants of the company-owned town.²⁹

The Court emphasized that “[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”³⁰ In *Marsh*, members of the public frequented store fronts that proprietors rented from the Gulf Shipbuilding Company.³¹ One plausible interpretation of *Marsh* is that when private property owners procure financial advantage from public use, courts may find state action based on a public-forum rationale.³² However, a second, and better, understanding of the decision lies in the Court’s description of Chickasaw. The Court emphasized that the company-owned town functioned as a traditional municipality.³³ Further, the Court recognized the corporation as a state actor based on a public-function analysis, because the corporation essentially stepped into the state’s shoes.³⁴

In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, the Supreme Court extended the holding of *Marsh* to privately owned shopping centers.³⁵ Members of the Amalgamated Food Employees Union picketed

27. *Id.* at 502–03.

28. *Id.*

29. *Id.* at 508–09.

30. *Id.* at 506.

31. *Id.* at 503.

32. *See id.* at 508.

33. *Id.* at 502–04. (“Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company town it would have been clear that appellant’s conviction must be reversed.”). The Gulf Shipbuilding Company even performed official policing activities by hiring a local sheriff to keep the peace in Chickasaw. *Id.* at 502.

34. *Id.* at 508–09. Courts cite *Marsh* when conducting public-forum and public-function analyses. *See, e.g.,* *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 319 (1968); *Evans v. Newton*, 382 U.S. 296, 299 (1966).

35. *Amalgamated Food Employees*, 391 U.S. at 319.

outside Weis Markets, which employed only non-union members.³⁶ Weis Markets was located in a large shopping center complex known as the Logan Valley Mall, and mall proprietors prohibited trespassing or soliciting by anyone other than its employees or shoppers.³⁷ Holding that Weis could not prohibit peaceful pickets by union members, the Court reasoned that the shopping center was analogous to the business block in *Marsh*.³⁸ The Court noted that the company-owned shopping district in *Marsh* and the Logan Valley shopping center served as commercial and retail centers open to the public.³⁹ The Court emphasized that members of the public enjoyed “unrestricted access to the mall property,”⁴⁰ suggesting that public access transformed the shopping center into a constitutionally protected public forum.⁴¹ While relying on the public-forum approach first announced in *Marsh*, the Court notably failed to demonstrate how the privately owned shopping center stepped into the state’s shoes and became a state actor.⁴² The Court did not suggest that the shopping center in the case assumed significant governmental functions, but merely reasoned that shopping centers increasingly resemble a type of town square forum.⁴³

In *Lloyd Corp. v. Tanner*, Vietnam War protestors sought to distribute handbills in the interior walkways of a privately owned shopping mall, despite a mall prohibition against distributing literature.⁴⁴ The Supreme Court distinguished this case from *Marsh* and *Logan Valley*, reasoning that the handbilling in the present case was “unrelated to the shopping center’s

36. *Id.* at 311. “A few days after it opened for business, Weis posted a sign on the exterior of its building prohibiting trespassing or soliciting by anyone other than its employees on its porch or parking lot.” *Id.* About a week later, members of the Amalgamated Food Employees Union began picketing Weis, claiming that the market was non-union and that its employees were not receiving union wages or other union benefits. *Id.* The picketing lasted for ten days and caused some congestion in the parcel pick-up area and parking lot. *Id.*

37. *Id.* at 310–11.

38. *Id.* at 317 (“The similarities between the business block in *Marsh* and the shopping center in the present case are striking.”). The Court highlighted the approximately one mile radius that the mall covered, as well as the composition of roads and sidewalks providing immediate access to members of the public. *Id.* at 317–18 (“The general public has unrestricted access to the mall property. The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*.”).

39. *Id.* at 319–20.

40. *Id.* at 318.

41. *Id.* But see *id.* at 338 (White, J., dissenting) (“Logan Valley is not a town but only a collection of stores. In no sense are any parts of the shopping center dedicated to the public for general purposes or the occupants of the Plaza exercising official powers. The public is invited to the premises but only in order to do business with those who maintain establishments there.”).

42. *Id.* at 338.

43. See *id.* at 317–19.

44. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 553, 556 (1972).

operations.”⁴⁵ While the picketing sanctioned in *Logan Valley* was directed at Weis Markets’ anti-union policies, the handbilling prohibited in *Lloyd* expressed anti-war sentiment, unrelated to any particular retail establishment.⁴⁶ The Court curtailed the expansive holding of *Logan Valley* by asserting that, to be protected, expressive activity must share a rational nexus with the purpose of the private property at issue.⁴⁷ The Court reasoned that the Vietnam War protestors could espouse their message in alternative locales, such as public streets, and achieve a similar result.⁴⁸

Four years later, in *Hudgens v. NLRB*, the Court rejected the public-forum approach altogether, expressly overruling *Logan Valley*.⁴⁹ In *Hudgens*, employees of Butler Shoe Company picketed outside of nine retail stores in Atlanta, one of which was located in the North DeKalb Shopping Center.⁵⁰ The shopping center was owned by the petitioner, Scott Hudgens.⁵¹ This time, the Court upheld the mall owner’s blanket prohibition against protests.⁵² In doing so, the Court highlighted Justice Powell’s majority opinion in *Lloyd*,⁵³ in which he distinguished a shopping center from a company-owned town: “In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power.”⁵⁴ The *Hudgens* Court adopted the *Lloyd* Court’s opinion that the private shopping center, unlike the Gulf Shipbuilding Company, did not perform governmental or state functions.⁵⁵ Embracing the notion that state action occurs only when a private entity assumes a governmental role, the Court retreated from its public-forum jurisprudence.⁵⁶

B. The New Jersey Experience: The Shopping Center as Public Forum

New Jersey courts and a minority of other jurisdictions part ways with the United States Supreme Court when evaluating governmental or state action by

45. *Id.* at 552. The Court conceded the public nature of the shopping mall and admitted that “considerable effort [was] made to attract shoppers and prospective shoppers.” *Id.* at 555. The Court, however, emphasized that the protest by the respondents “had no relation to any purpose for which the center was built and being used.” *Id.* at 564.

46. *See id.* at 563–64.

47. *Id.* The Court distinguished *Logan Valley*: “The message sought to be conveyed by respondents was directed to all members of the public, not solely to patrons of Lloyd Center or of any of its operations.” *Id.* at 564.

48. *Id.*

49. *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976).

50. *Id.* at 509.

51. *Id.*

52. *Id.* at 520–21.

53. *Id.* at 518–19 (quoting *Lloyd*, 407 U.S. at 567–69).

54. *Id.* at 519 (quoting *Lloyd*, 407 U.S. at 568–69).

55. *Id.* at 519–21 (quoting *Lloyd*, 407 U.S. at 567–69).

56. *Id.* (quoting *Lloyd*, 407 U.S. at 568–69).

private entities.⁵⁷ Those courts recognize that certain private properties, such as private universities and shopping centers, are public forums and are subject to state constitutional provisions.⁵⁸ In essence, those courts continue to follow *Logan Valley*, although the Supreme Court later retreated from that holding.⁵⁹ New Jersey and other jurisdictions point to the encompassing language of their state constitutions as the basis for applying constitutional safeguards to certain private actors.⁶⁰ Under the public-forum approach, courts consider foremost whether such organizations hold themselves open to the public.⁶¹

In *State v. Schmid*, the New Jersey Supreme Court formulated a public-forum model whereby particular private property owners can be treated as public actors subject to state constitutional free speech provisions.⁶² In *Schmid*, the court considered whether Princeton University, a private nonprofit institution, could prohibit a non-student from distributing and selling political materials on campus.⁶³ In determining whether First Amendment protections attached, the court refrained from considering whether Princeton resembled a company-owned town.⁶⁴ The court also summarily rejected the Supreme Court's reasoning in *Hudgens*, asserting instead that the New Jersey Constitution, unlike the federal Constitution, does not explicitly require state

57. See, e.g., *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 760 (N.J. 1994); *State v. Schmid*, 423 A.2d 615, 628 (N.J. 1980); see also *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979); *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590, 591 (Mass. 1983); *Alderwood Assoc. v. Wash. Envtl. Council*, 635 P.2d 108, 110 (Wash. 1981).

58. See, e.g., *J.M.B. Realty Corp.*, 650 A.2d at 760; see also *Schmid*, 423 A.2d at 628.

59. See, e.g., *J.M.B. Realty Corp.*, 650 A.2d at 768, 775-76.

60. See, e.g., *Schmid*, 423 A.2d at 626-27 (noting the broad language contained in the New Jersey constitution). For example, the New Jersey constitution provides: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. Const. art. I, ¶ 6 (emphasis added); see also Frank Askin, *Free Speech, Private Space, and the Constitution*, 29 RUTGERS L.J. 947, 950-51 (1998). Askin argues that the First Amendment to the United States Constitution and state constitutional provisions regarding free speech are distinguishable. *Id.* at 951 ("The First Amendment to the United States Constitution is written in the negative: 'Congress shall make no laws.'" By contrast, Askin notes that most state constitutional provisions are "written in the affirmative, guaranteeing to individuals the rights of freedom of expression.").

61. See *Schmid*, 423 A.2d at 628-29.

62. See *id.* at 628 (The court reasoned that state constitutional guarantees of free expression extend directly to governmental actors and are also "available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property.").

63. *Id.* at 616-17. University regulations required off-campus organizations to obtain permission before distributing materials on campus. University-affiliated organizations and Princeton students, however, were not required to obtain such permission. *Id.* at 617.

64. Cf. *id.* at 639 (Schreiber, J., concurring).

action.⁶⁵ Instead, the court reasoned that the New Jersey Constitution furnished a separate basis for protecting individual rights of speech and assembly.⁶⁶ Whereas the federal Constitution prohibits Congress and state governments from infringing on free speech, the *Schmid* court stated that New Jersey's Constitution prohibited not only governmental bodies, but "under some circumstances . . . private persons as well," from curtailing protected speech.⁶⁷

In holding that Schmid's activities were indeed protected by the state constitution, the court considered three factors: "(1) the nature, purposes, and primary use of such private property, . . . (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property."⁶⁸ Based on this three-prong test, the court found that the privately owned university campus was a public forum, to which state constitutional provisions applied.⁶⁹ The state constitution precluded Princeton University, a private institution, from prohibiting students and strangers alike from disseminating their views on campus.⁷⁰

Schmid opened the floodgates to numerous state constitutional challenges against private organizations, and New Jersey courts consistently departed from United States Supreme Court precedent. This departure subjected privately owned shopping centers, as well as a private condominium

65. *Id.* at 624–28. The court noted:

Most recently, this Court recognized through Chief Justice Wilentz that freedom of the press, intimately associated with individual expressional and associational rights, is strongly protected under the State Constitution The United States Supreme Court itself has acknowledged that the First Amendment, which implicates this important freedom, does not accord to it the degree of protection that may be available through state law.

Id. at 626.

66. *Id.* at 624–26. The United States Supreme Court recognized that a state constitution's guarantees of individual rights "may surpass the guarantees of the Federal Constitution." *Id.* at 628 (citing *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 78–82 (1980)).

67. *Id.* at 628.

68. *Id.* at 630 (internal quotation marks omitted). The court reasoned that free expression is an integral component of fostering student development and promoting scholarship, two key purposes of the modern university. *Id.* Evaluating the second factor, the court reasoned that the university endorsed public participation in academic life by creating an open campus. *Id.* at 631. Finally, the court asserted that disseminating political literature was compatible with the educational goals of the university or the university's use of its property for educational purposes. *Id.*

69. *Id.* at 630–31 ("Princeton University, as a private institution of higher education, clearly seeks to encourage both a wide and continuous exchange of opinions and ideas and to foster a policy of openness and freedom with respect to the use of its facilities."). *But see id.* at 637, 639 (Schreiber, J., concurring) (asserting that for Schmid to succeed under the First and Fourteenth Amendments "[p]rivate property must possess all the attributes of or be the equivalent of a state-created municipality before it stands in the shoes of the State").

70. *Id.* at 632–33.

association, to state constitutional free speech provisions.⁷¹ In *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, the New Jersey Supreme Court declared that every regional shopping mall in the state was a constitutionally protected public forum.⁷² The court asserted that the New Jersey Constitution allowed civic group members to distribute anti-war leaflets in various regional shopping malls over the objections of mall owners.⁷³ Citing *Schmid*, the court reasoned that private shopping centers have replaced downtown business districts as forums for public expression: "their normal use is all-embracing, almost without limit, projecting a community image, serving as their own communities, encompassing practically all aspects of a downtown business district, including expressive uses and community events."⁷⁴ The court further held that mall owners subjected themselves to constitutional liability, typically reserved for governmental actors, by extending to members of the public an "all-inclusive" invitation to frequent malls.⁷⁵

Finally, the New Jersey Superior Court applied the reasoning of *Schmid* to common-interest communities in *Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n*.⁷⁶ The court considered whether a condominium association that endorsed particular political candidates and distributed campaign materials to residents could deny opposing campaigns access to the private complex.⁷⁷ The court recognized the right of non-association-endorsed candidates to distribute campaign materials in the complex, reasoning that because the Galaxy association engaged in significant political activity at election time, the private property was essentially converted

71. See *supra* notes 57–61 and accompanying text.

72. N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 761 (N.J. 1994).

73. *Id.* at 760–62. "Plaintiffs—a coalition of numerous groups—opposed military intervention [in the Middle East and the Persian Gulf] and sought public support for its views." *Id.* at 762 & n.2 (footnote omitted). The Coalition embarked on a "massive leafleting campaign . . . urging the public to contact Congress to persuade Senators and Representatives to vote against military intervention." *Id.* at 762. The campaign took place on November 9th and 10th. *Id.* The campaign on November 10th targeted large regional shopping centers. *Id.*

74. *Id.* at 761.

75. *Id.* The court emphasized that the leafleting in question—non-commercial speech unaccompanied by "megaphone, soapbox, speeches, or demonstrations"—was permissible, subject to reasonable restrictions. *Id.* In addition, the court noted that a former common channel of public expression, the downtown business district, "has been severely diminished." *Id.* The court opined that the repercussions of prohibiting speech in regional shopping centers "would block a channel of free speech that could reach hundreds of thousands of people, carrying societal messages that are at its very core." *Id.*

76. *Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condo. Ass'n*, 688 A.2d 156, 156–58 (N.J. Super. Ct. Ch. Div. 1996).

77. *Id.* at 156–57.

“from private to political and thus public use.”⁷⁸ The court reasoned that the Galaxy complex was analogous to a public forum, emphasizing that it contained a mall as well as polling booths for all federal, state, and municipal elections, and that these facilities were accessible from the public street.⁷⁹ By emphasizing public invitation and access, the *Guttenberg* court expanded the scope of public-forum jurisprudence, paving the way for similar challenges against community associations.⁸⁰

Only a handful of states have followed in New Jersey’s footsteps, subjecting certain private property to state constitutional provisions by virtue of public access to that property.⁸¹ California courts have also departed from United States Supreme Court jurisprudence, reasoning that the expansive language of the California Constitution’s free speech provision applies to governmental actors and certain private entities alike.⁸² The approach that New Jersey and

78. *Id.* at 158. The court emphasized that the Association was significantly engaged in local elections because it provided absentee ballot applications to its residents and organized telephone squads to ensure that Galaxy residents voted. *Id.* at 157–58. The Association also organized registration drives, and provided poll workers for onsite polling booths. *Id.* at 157.

79. *Id.*

80. *Id.* at 158–59. The court, however, reasoned that the decision was particularly fact-specific, emphasizing that the “nature of the private property at issue here is quite different from the type of property at issue in *Schmid* or *Coalition*.” *Id.*

81. See *supra* note 57; see also *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n*, 929 A.2d 1060, 1070 (N.J. 2007) (“[O]nly a handful of states recognize a constitutional right to engage in [expressive] activity on privately owned property held open to the public, such as a shopping mall or a college campus.”).

82. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 346–47 (Cal. 1979). In *Robins*, the California Supreme Court affirmed the rights of high school students to solicit signatures in the Pruneyard Shopping Center for their petition to the White House. *Id.* at 342. The court expanded on *Hudgens*, reasoning that article I, section 2 of the California Constitution precluded shopping center owners from prohibiting expressive activity on their premises. *Id.* at 344. The court reasoned that the California Constitution afforded “special” protections for free speech: “[t]hrough the framers could have adopted the words of the federal Bill of Rights they chose not to do so.” *Id.* at 346. Furthermore, “article I, section 2 of the state Constitution reads: ‘Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.’” *Id.* Because mall “premises are open to the public during shopping hours,” mall owners could not prohibit members of the public from petitioning shoppers. *Id.* at 344. The court emphasized the public nature of the shopping center, highlighting its twenty-one acres, walkways, plazas, and buildings containing shops, restaurants, and a theatre. *Id.* at 342.

Despite the holding in *Robins* however, the California Supreme Court has refused to extend the reasoning of *Robins* to a residential apartment complex. See *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 29 P.3d 797, 803 (Cal. 2001). There, the court considered “whether a tenants association has the right to distribute its newsletter in a privately-owned apartment complex under article I, section 2 . . . of the California Constitution.” *Id.* at 799. The *Golden Gateway* court criticized the *Robins* court for sidestepping the state action question. *Id.* at 803 (“Not surprisingly, the uncertainty surrounding the fate of the state action limitation has spawned a debate over the wisdom of extending our free speech clause to private actors.”). Reasoning that the owner could indeed prohibit tenants from distributing their newsletters, the court highlighted the private character of the complex:

California embrace, however, represents the exception rather than the rule,⁸³ and only a handful of jurisdictions have followed their lead. By contrast, most jurisdictions follow the Supreme Court's reasoning in *Hudgens*.⁸⁴

Here, the Complex is privately-owned, and Golden Gateway, the owner, restricts the public's access to the Complex. In fact, Golden Gateway carefully limits access to residential tenants and their invitees. Thus, the Complex, unlike the shopping centers in *Robins*, is not the functional equivalent of a traditional public forum. Accordingly, Golden Gateway's actions do not constitute state action for purposes of California's free speech [provisions], and the Tenants Association has no right to distribute its newsletter

Id. at 810.

83. Two other jurisdictions have followed the New Jersey minority approach. In *Batchelder v. Allied Stores International Inc.*, the Massachusetts Supreme Court recognized a political candidate's right to solicit signatures and distribute campaign materials in a private shopping mall. 445 N.E.2d 590, 591 (Mass. 1983). The court reasoned that candidates could seek signatures for ballot access, because shopping malls are bustling centers where candidates can achieve personal contact with voters. *See id.* at 595. In addition, the court noted that private shopping centers benefit in terms of sales from broad public access. *Cf. id.* at 595 & n.12. However, the court carefully limited the protected expressive activity to candidates seeking ballot access: "We are concerned with ballot access and not with any claim of a right to exercise free speech rights apart from the question of ballot access." *Id.* at 595.

Likewise, in *Alderwood Associates v. Washington Environmental Council*, the Supreme Court of Washington affirmed environmental advocates' right to solicit signatures in a privately owned shopping center despite the owner's objections. 635 P.2d 108, 110 (Wash. 1981). The court asserted that advocacy group members enjoyed state constitutional protections to solicit signatures on mall property, noting the similarity between modern day shopping malls and downtown business districts. *Id.* at 117. A divided court adopted the three-prong test announced in *Schmid*, for evaluating whether a privately owned space serves as a public forum subject to state constitutional provisions. *Id.* at 108, 115-16; *see also Schmid v. State*, 423 A.2d 615, 630 (N.J. 1980). The court also compared the Washington State Constitution to those of New Jersey and California, reasoning that the state free speech and initiative provisions do not expressly require governmental or state action. *Alderwood*, 635 P.2d at 115-16. Instead, based on the balancing approach discussed above, the court considered whether private property served as a public forum. *Id.* at 116.

Despite the court's holding in *Alderwood*, the Washington State Supreme Court retreated from the public-forum approach. *See Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 780 P.2d 1282, 1290 (Wash. 1989). Leaving the holding undisturbed, the court severely weakened the *Alderwood* rationale by rejecting a claim by members of a minority political organization seeking to distribute literature and solicit donations on mall property. *Id.* at 1283. The court emphatically asserted: "it is, always has been, and remains basic constitutional doctrine that both the federal and state bills of rights, of which the right of free speech is a part, were adopted to protect individuals against actions of the state." *Id.* at 1287. The court reasoned that the Washington State Constitution prohibits only governmental actors, rather than private individuals and organizations, from impinging on protected freedoms. *Id.* at 1287-88.

84. *See Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976). Although New Jersey and California courts rely on the language of their respective state constitutions, other jurisdictions with similarly worded state constitutions require state action. *See Cologne v. Westfarms Assocs.*, 469 A.2d 1201, 1207-08 (Conn. 1984). For example, although the Connecticut Constitution provides, "[e]very citizen may freely speak," the Supreme Court of Connecticut declined, in *Cologne*, to apply state constitutional provisions to a regional shopping mall. *Id.* at 1208-09. In *Cologne*, female political advocates sought to enjoin the owners of a large regional shopping mall

from prohibiting the women's distribution of literature and collection of signatures in support of the Equal Rights Amendment. *Id.* at 1202–03. The court, however, ruled in favor of the mall owners, reasoning that the Connecticut Constitution, like the federal Constitution, only limits the power of governmental actors. *Id.* at 1208–09. The court rejected plaintiffs' argument that Article Four of the Connecticut Constitution differed significantly from the First Amendment of the federal Constitution: "[w]e are not persuaded that these variations in phraseology are sufficient to indicate an intention to allow those rights to be exercised upon every property affording a suitable opportunity for their enjoyment against the objections of the owners." *Id.* at 1208–09. Embracing a strict state action requirement, the court asserted that a mere invitation to the public to use private property does not transform such property into a public forum, on which state constitutional safeguards must apply. *Id.* at 1209–10 (citing *Lloyd v. Tanner*, 407 U.S. 551, 569 (1972)). See also *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs.*, 392 S.E.2d 8, 9–10 (Ga. 1980) (rejecting civic group members' claims that malls are the "new town centers," and serve as public forums dedicated to public use); *Woodland v. Mich. Citizens Lobby*, 378 N.W.2d 337, 348 (Mich. 1985) ("[U]nless otherwise expressed, constitutionally guaranteed protections are applicable only against government.").

New York courts have also repudiated the public-forum approach, and instead apply state constitutional provisions only to private entities engaged in governmental or state action. For example, in *SHAD Alliance v. Smith Haven Mall*, the New York Court of Appeals considered whether a private shopping mall could enforce a blanket no-handbilling policy. 488 N.E.2d 1211, 1212 (N.Y. 1985). An advocacy group challenged the prohibition and sought to distribute leaflets opposing nuclear energy. *Id.* at 1213. The court ruled in favor of the shopping mall owners despite the encompassing language of Article I, section 8, of the New York state constitution. *Id.* at 1215–16. The New York Constitution provides "[e]very citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. CONST. art. I, § 8. The *SHAD* court emphasized that the state constitution's guarantees of free speech were enacted to protect individuals from encroachments by governmental actors rather than private entities, reasoning: "[t]hat a Bill of Rights is designed to protect individual rights against the government is standard constitutional doctrine." *SHAD*, 488 N.E.2d at 1215. While acknowledging that "the shopping mall has taken on many of the attributes and functions of a public forum," the court refused to apply state constitutional provisions to private property owners who invite or encourage public access. *Id.* at 1217–18. See also *Fiesta Mall Venture v. Mecham Recall Comm.*, 767 P.2d 719, 723 (Ariz. Ct. App. 1989) (reasoning that because the shopping centers in question were privately owned, the owners could prohibit political activities on their premises); *State v. Felmet*, 273 S.E.2d 708, 712 (N.C. 1981) ("The accosting of customers in the private parking lot of Hanes Mall to sign a petition, which was a type of solicitation prohibited by the owners of the property, was not a protected exercise of free speech," under either the federal or state constitutions.); *W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 515 A.2d 1331, 1335–36 (Pa. 1986) (reasoning that the controlling provision of the Pennsylvania Constitution represents a limitation on the powers of state government, but not private corporations such as regional shopping centers); *Charleston Joint Venture v. McPherson*, 417 S.E.2d 544, 548 (S.C. 1992) (asserting that mall proprietors extend only a limited invitation to shoppers to engage in commercial activity, rather than expressive activity, on mall premises); *Jacobs v. Major*, 407 N.W.2d 832, 845 (Wis. 1987) (asserting that even if malls serve some "public function," their primary goal is to maximize profits, therefore the malls cannot be said to resemble municipalities).

*C. The Public-Forum Approach Applied to Twin Rivers
Homeowners' Ass'n*

1. The Appellate Division Delivers an Anomalous Decision

The New Jersey Superior Court Appellate Division was the first state court in the country to apply the free speech provisions of its state constitution to a private community association.⁸⁵ In 2006, the court decided *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, in which a group of dissident residents sued the Twin Rivers Homeowners' Association (Association).⁸⁶ Residents alleged that various Association regulations violated the state constitution.⁸⁷ The court agreed, citing *Schmid* and *J.M.B. Realty*.⁸⁸ The court emphasized that the expressive rights at issue trumped any interest in private property.⁸⁹ It declined to call the Association a state actor, but did term it a "constitutional actor."⁹⁰ In exercising any dominion over residents, the court determined that the Association was obligated to conform to the state constitution.⁹¹

85. See American Civil Liberties Union of New Jersey, *supra* note 14. The press release noted: "Professor Askin described the case as a national landmark, and said that homeowners groups across the country have anxiously awaited the outcome, and would now try to convince other states' courts to emulate New Jersey." *Id.*; see also David L. Hudson Jr., *Private Condo Groups Subject to Free Speech Rights*, 7 ABA J. E-REPORT 1, 2 (2006) (quoting Askin on the significance of the ruling: "[i]t is a Magna Carta for the million-plus residents of such communities in New Jersey").

86. *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 890 A.2d 947, 951 (N.J. Super. Ct. App. Div. 2006), *rev'd*, 929 A.2d 1060 (N.J. 2007).

87. *Id.* The residents filed a nine-count complaint alleging that the association's regulations governing the posting of political signs, access to the community room, and access to the community newsletter violated the New Jersey Constitution. *Id.*

88. *Id.* at 957–59; see also Frank Askin, *Twin Rivers: Why the Appellate Division Got It Right*, 242 N.J. LAW. Oct. 2006, at 11, 14–15 (2006) (recognizing the court's analogy comparing community associations with shopping malls).

89. *Twin Rivers*, 890 A.2d at 962 ("[E]ven where there has been no invitation to the public, our jurisprudence clearly allows access to private property to exercise constitutionally guaranteed rights. *Twin Rivers* is in New Jersey. The rights guarantees of our State Constitution apply in that community as in every other in the State.").

90. *Id.* at 960.

91. See *id.* The court opined:

The manner and extent to which functions undertaken by community associations have supplanted the role that only towns or villages once played in our polity mirrors the manner and extent to which regional shopping centers have become the functional equivalents of downtown business districts. Common-interest developments are the fastest growing form of housing in the United States. New Jersey is among the states in which residential community associations are most common. It follows that fundamental rights exercises, including free speech, must be protected as fully as they always have been, even where modern societal developments have created new relationships or have changed old ones.

Id. at 960 (citations and internal quotation marks omitted).

2. The New Jersey Supreme Court Reverses

On appeal, the New Jersey Supreme Court applied the public-forum approach expounded in *Schmid* and *J.M.B. Realty*, but reached the opposite result.⁹² Applying the three factors enumerated in *Schmid*, the court adopted the Association's argument that state constitutional obligations should not extend to the internal membership rules of private homeowners' associations.⁹³ After balancing private property interests against free speech rights, the court held that the minor restrictions were neither unreasonable nor oppressive.⁹⁴ It refrained from applying state constitutional provisions to the Association because, unlike universities and shopping centers, common-interest communities do not expressly or impliedly invite members of the public into their borders.⁹⁵

92. Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1074 (N.J. 2007); see also Richard G. Jones, *Court Upholds Curbs on Signs in New Jersey*, N.Y. TIMES, July 27, 2007, at B3 (summarizing the court's holding).

93. *Twin Rivers*, 929 A.2d at 1072–73. First, the court reasoned that the primary purpose and use of the property was residential. *Id.* at 1072. Although a few businesses reside within Twin Rivers' borders, the court emphasized that the Association derives no revenue from such businesses. *Id.* Considering the second factor, the nature and extent of public access, the court reasoned that the Association "has not invited the public to use its property." *Id.* at 1073. In rejecting the members' claim that *Schmid* and *Coalition* were analogous, the court rejected the "all inclusiveness" argument that the members presented. See Brief of Appellee at 16–17, *Twin Rivers*, 929 A.2d 1060 (N.J. 2007) (No. A-118-122-05), available at <http://www.aclu-nj.org/downloads/TwinRiversBrief.pdf> ("[U]nlike visitors to a mall, our plaintiffs do not leave the property at the end of the day; they and their families live and sleep there."). Instead, the court emphasized the exclusivity of Twin Rivers: "[t]rust-owned property and facilities are for the exclusive use of Twin Rivers' residents and their invited guests." *Twin Rivers*, 929 A.2d at 1073. The court explicitly rejected any characterization of Twin Rivers as a public forum in which constitutional safeguards should apply. *Id.*

Finally, the court considered the third *Schmid* factor: "the purpose of the expressional activity in relation to both the private and public use of the property." *Id.* It characterized the expressive activity at issue as "political-like speech aimed at affecting the manner in which Twin Rivers is managed." *Id.* Nevertheless, the court asserted that the plaintiffs' expressive rights were not "unreasonably restricted." *Id.* Instead, the court characterized the Association's regulations governing the posting of signs, use of the community room, and access to the community newspaper as reasonable time, place, and manner restrictions. *Id.* at 1074.

94. *Id.*

95. See *id.* at 1073. The court noted community members seeking to unseat the current governing board may resort to alternative means of expression:

Plaintiffs can walk through the neighborhood, ring the doorbells of their neighbors, and advance their views. As found by the trial court, plaintiffs can distribute their own newsletter to residents, and have done so. As members of the Association, plaintiffs can vote, run for office, and participate through the elective process in the decision-making of the Association. Thus, plaintiffs may seek to garner a majority to change the rules and regulations to reduce or eliminate the restrictions they now challenge.

Id. at 1074.

D. Beyond the Public Forum: Alternate Models of State Action

Courts have advanced three alternative theories of state action when evaluating constitutional claims against private entities. These three approaches—(1) the public-function theory, (2) the state entwinement theory, and (3) the judicial enforcement theory—offer criteria for characterizing particular private actors as state actors so that federal constitutional provisions would apply.⁹⁶

1. The Public-Function Theory

The first and most tenable theory for finding state action in the community association context was articulated by the United States Supreme Court in *Marsh v. Alabama*.⁹⁷ One rationale for the *Marsh* holding rested upon the extent to which the company-owned town resembled other American towns in all manners.⁹⁸ In *Evans v. Newton*, the United States Supreme Court further explicated the public-function approach.⁹⁹ At issue in that case was whether a park owned by a private trust could exclude non-white visitors.¹⁰⁰ The Court reasoned that the park could not exclude people on the basis of race under the Equal Protection Clause of the Fourteenth Amendment.¹⁰¹ The Court asserted that the privately owned park was essentially public, emphasizing that parks are municipal in nature: “[a] park . . . is more like a fire department or police department that traditionally serves the community.”¹⁰² A public-function theory may support a finding of state action when private organizations are

96. See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291 (2001) (basing its holding on the entwinement theory); *Gerber v. Longboat Harbour N. Condo., Inc.*, 757 F. Supp. 1339, 1341 (M.D. Fla. 1991) (discussing the judicial enforcement theory); *Brock v. Watergate Mobile Home Park Ass’n*, 502 So. 2d 1380, 1381 (Fla. Dist. Ct. App. 1987) (noting the public-function test).

97. See 326 U.S. 501, 508–09 (1946).

98. *Id.* at 507–08.

99. 382 U.S. 296, 299 (1966).

100. *Id.* at 297–98. In 1911, a former Georgia Senator executed a last will and testament devising to the mayor and city council of Macon a tract of land that was to be used as “‘a park and pleasure ground’ for white people only.” *Id.* at 297. Although the Senator stated in his will that “‘he had only the kindest feeling for the Negroes,’” he was nevertheless of the opinion that “‘the two races . . . should be forever separate.” *Id.*

101. *Id.* at 302.

102. *Id.* In particular, the Court noted that the city played an integral role in the park’s maintenance:

From the pleadings we assume it was swept, manicured, watered, patrolled, and maintained by the city as a public facility for whites only, as well as granted tax exemption under Ga. Code Ann. § 92-201. The momentum it acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of “private” trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility.

Id. at 301.

“endowed by the State with powers or functions governmental in nature.”¹⁰³ Such an approach considers whether a private organization or actor assumes what is essentially a governmental role.¹⁰⁴

Courts have applied the public-function theory in varying contexts, recognizing particular private individuals or organizations as state actors. For example, in *West v. Atkins*, a prisoner filed a lawsuit against a physician who contracted with the State of North Carolina to provide orthopedic services at a state prison hospital.¹⁰⁵ The prisoner argued that he received inadequate medical treatment, which violated his Eighth Amendment right of freedom from cruel and unusual punishment.¹⁰⁶ The Supreme Court reasoned that a physician who treats an inmate in a state prison acts under color of state law within the meaning of 42 U.S.C. § 1983.¹⁰⁷ The Court found that the physician’s conduct was “fairly attributable to the State” because the state has an obligation under the Eighth Amendment to provide medical services to prisoners.¹⁰⁸

Courts have also recognized private corporations serving in governmental capacities as state actors. In *Rosborough v. Management & Training Corp.*, the United States Court of Appeals for the Fifth Circuit considered a prisoner’s Eighth Amendment claim against a corrections officer.¹⁰⁹ The district court dismissed the claim *sua sponte*, “on the ground that [the corrections officer] was an employee of [a private prison management corporation] rather than an employee of the State of Texas and, therefore, was not acting under color of state law.”¹¹⁰ The appellate court reversed, reasoning that the “confinement of wrongdoers—though sometimes delegated to private entities—is

103. *Id.* at 299.

104. *See, e.g.,* *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

105. *West v. Atkins*, 487 U.S. 42, 43–44 (1988).

106. *Id.* at 45. The petitioner filed a lawsuit in federal court under 42 U.S.C. § 1983 alleging the physician acted “under color of state law.” *Id.* at 43. The petitioner argued that Dr. Atkins treated his injury by placing his leg in a series of casts, but refused to schedule surgery, despite acknowledging that such a procedure was necessary. *Id.* at 44. The petitioner claimed that Dr. Atkins discharged him even though his ankle was swollen and painful, and his movement was still labored. *Id.*

107. *Id.* at 54.

108. *Id.* at 54–55. The Court concluded that because “North Carolina employs physicians, such as [Dr. Atkins], and defers to their professional judgment” in order to fulfill the state’s obligation to its prisoners, such physicians treat inmates while “clothed with the authority of state law.” *Id.* at 55; *see also* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (The Court asserted that “fair attribution” to the State requires first, that the deprivation must be caused by the exercise of some right created by the State, and “[s]econd, the party charged with the deprivation must be a person who may fairly be said to be a state actor.”).

109. *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 459–60 (5th Cir. 2003). The inmate alleged that the officer slammed a prison door on his fingers, severing two fingertips. *Id.*

110. *Id.* at 460.

fundamentally a governmental function.”¹¹¹ The court emphasized that prison operation falls particularly within the state’s province.¹¹²

Similarly, some residents claim that community associations serve a public function because the associations provide for private governance by enacting regulations and performing neighborhood maintenance. In *Bluvias v. Winfield Mutual Housing Corp.*, prospective buyers challenged an association regulation giving existing members priority in purchasing housing units as they became vacant.¹¹³ The New Jersey Supreme Court rejected the Equal Protection challenge, reasoning that the community association “does not exercise the governmental powers of the community.”¹¹⁴ Although the association owned all of the property within the boundaries of the township, the court emphasized that it was the municipality who provided traditional governmental services, including public education.¹¹⁵ Because the municipality provided governance and essential services—not the community association—the community association did not assume the role of the state.¹¹⁶

2. The Entwinement Theory

A second approach, known as the entwinement theory or the “symbiotic relationship” theory, applies when a governmental body and a private organization act interdependently, such that they could be viewed as one entity.¹¹⁷ In *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n* (TSSAA), the United States Supreme Court found a private organization to be a state actor when it was charged with the oversight of interscholastic athletics among public and private high schools.¹¹⁸ The Court focused on several factors that suggested that TSSAA and the school district were

111. *Id.* at 461.

112. *See id.* The court also noted the Supreme Court’s suggestion that state prisoners might file suit under § 1983 against privately owned correctional facilities. *Id.* at 460; *see also* *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 71–72 & n.5 (2001). The Fifth Circuit, relying upon other federal courts, reasoned that the power exercised by the private prison management company is delegated by the state. *Rosborough*, 350 F.3d at 461; *see also* *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991) (reasoning that a private company administering a state corrections facility could be sued under § 1983).

113. *Bluvias v. Winfield Mut. Hous. Corp.*, 556 A.2d 321, 322 (N.J. 1989). “[M]embership bylaws establish[ed] a priority membership list, [that] favored existing members or their immediate families for ownership of cooperative housing units as they [became] vacant.” *Id.* at 322.

114. *Id.*

115. *See id.*

116. *Id.*

117. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 305 (2000) (Thomas, J., dissenting); *see also* Monique C.M. Leahy, *Homeowners’ Association Defense: Free Speech*, 93 AM. JUR. TRIALS § 12 (2004) (“[E]ntwinement’ with the government will support the conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards.”).

118. *Brentwood Acad.*, 531 U.S. at 290–91.

intimately connected.¹¹⁹ One such factor was that more than eighty percent of participants were public schools.¹²⁰ Moreover, the public schools provided financial support for TSSAA, and the board held meetings during school hours.¹²¹ Thus, the Court found that because public schools and the association were essentially interdependent, TSSAA was a state actor.¹²²

The entwinement theory and public-function theory appear to be interrelated. Arguably, the Court may also have properly found that TSSAA satisfied the public-function test by organizing an interscholastic athletics program that primarily benefited public schools.¹²³ The Court embraced the entwinement theory, rather than the public-function theory, as a basis for imposing constitutional liability, because the former more precisely describes the interrelatedness of TSSAA and the state.¹²⁴

The United States Supreme Court, however, has selectively recognized private organizations as state actors based upon the entwinement theory. In *Jackson v. Metropolitan Edison Co.*, a consumer sued a privately owned and operated electric utility company for violating her Fourteenth Amendment right to procedural due process.¹²⁵ The customer claimed that her electrical service was terminated before she was afforded notice, a hearing, and an opportunity to pay her overdue bill.¹²⁶ Although Metropolitan held a certificate issued by the Pennsylvania Utility Commission authorizing the utility to deliver electricity to a designated region of the state, the Court asserted that the utility's activities were not fairly attributable to the state.¹²⁷ The Court also emphasized that although a utility may operate in the "public

119. *Id.* at 292–93. For example, the Association bylaws provided that each member school designate a faculty member or principal as a voting representative. *Id.* at 298.

120. *Id.* at 298.

121. *Id.* at 299. In addition, Association members were eligible for state-subsidized retirement benefits. *Id.* at 300.

122. *Id.* at 299–300 (“There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms.”).

123. *See id.* at 302–03. Although the Court assumed, for purposes of its analysis, that the public-function theory was inapplicable, it did not decide the merits of the claim. *Id.* at 303. If the Court had addressed the public-function theory, however, TSSAA is arguably distinguishable from the school in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (the case cited by the Association) because, as the Court points out, the public function performed must be “exclusively and traditionally” public. *Id.* at 302–03. The *Brentwood* Court observed that in *Rendell-Baker*, a private school offering special-needs education to high school students was not a state actor because provision of such services was not historically the role of the state. *Id.* By contrast, in *Brentwood*, the Association had been acting in its capacity since 1925, and therefore arguably is distinguishable from the private special-needs school in *Rendell-Baker*. *Id.* at 292.

124. *Id.* at 302–03.

125. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 347–48 (1974).

126. *Id.* at 347.

127. *Id.* at 346, 350–51.

interest," such a standard would immeasurably expand the scope of private individuals and organizations deemed state actors.¹²⁸

Similarly, courts have refrained from finding that community associations are so entwined with the state as to essentially equate association conduct with state action. In *Brock v. Watergate Mobile Home Park*, several mobile-home owners challenged various association regulations as being in violation of their civil rights.¹²⁹ The homeowners argued that the special statutory status mobile homes enjoyed "create[d] a nexus between the State and the association that would make the board's actions equivalent to state action."¹³⁰ In its decision, however, the Florida District Court of Appeals considered and rejected that argument, reasoning that subjection to state law does not foster the level of interdependence necessary to give rise to state action.¹³¹ This case illustrates the entwinement theory's limited application.

3. The Judicial Enforcement Theory

A third approach, called the judicial enforcement theory, appears least useful for finding state action in the context of community association activity. In *Shelley v. Kraemer*, the United States Supreme Court refused to enforce a racially restrictive covenant, holding that judicial enforcement of the covenant would amount to state action and violate the Fourteenth Amendment.¹³² The Court reasoned that

these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.¹³³

128. *Id.* at 353. The Court asserted that:

Doctors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, "affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State.

Id. at 354.

129. *Brock v. Watergate Mobile Home Park Ass'n*, 502 So. 2d 1380, 1381 (Fl. Dist. Ct. App. 1987).

130. *Id.*

131. *Id.* at 1382.

132. *Shelley v. Kraemer*, 334 U.S. 1 (1948); see also Suarez, *supra* note 6, at 756-57. The case arose when an African American family sought to purchase property from a willing seller. *Shelley*, 334 U.S. at 5. The land, however, was burdened by a servitude prohibiting occupation "by any person not of the Caucasian race." *Id.*

133. *Shelley*, 334 U.S. at 19.

The Court emphasized that voluntary adherence to the restrictive covenant would not have implicated the Fourteenth Amendment.¹³⁴ However, because the petitioners resorted to the judiciary to force compliance, the lower court, acting as an agent of the state, could not act without violating the Equal Protection clause.¹³⁵

Few courts have extended the reasoning in *Shelley* as a basis for constitutional scrutiny of private covenants in common-interest communities.¹³⁶ For example, in *Gerber v. Longboat Harbour North Condominium, Inc.*, the United States District Court for the Middle District of Florida employed *Shelley* as a basis for invalidating a condominium association regulation that prohibited the display of the American flag, except on designated holidays.¹³⁷ However, the majority of courts faced with this question have discussed and dismissed the judicial enforcement approach when considering private land use restrictions.¹³⁸

134. *Id.* ("It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.").

135. *Id.* at 19–20.

136. See Suarez, *supra* note 6, at 757; see also Hyatt & Stubblefield, *supra* note 2, at 659.

137. See *Gerber v. Longboat Harbour N. Condo., Inc.*, 757 F. Supp. 1339, 1341 (M.D. Fla. 1991) (The court asserted that the principle enunciated in *Shelley* supports the finding that "judicial enforcement of private agreements contained in a declaration of condominium constitutes state action and brings the heretofore private conduct within the scope of the Fourteenth Amendment, through which the First Amendment guarantee of free speech is made applicable to the states."); see also *Goldberg v. 400 E. Ohio Condo. Ass'n*, 12 F. Supp. 2d 820, 822 (N.D. Ill. 1998) ("[O]ld-fashioned patriotism, rather than old-fashioned legal reasoning, is the source of the *Gerber* opinion's persuasive force. The plaintiff, we are told, was an Air Force veteran who wished to 'express[] his deep love and respect for America.'").

138. See *Goldberg*, 12 F. Supp. 2d at 823 ("[T]here is no state action inherent in the possible future state court enforcement of a private property agreement."); see also *Loren v. Sasser*, No. 8:99-2413-T-17B, 2000 WL 641602, at *2 (M.D. Fla. Apr. 11, 2000) ("[T]he mere possibility of judicially enforced private covenants does not satisfy the 'state action' requirement of the Fourteenth Amendment."), *aff'd*, 309 F.3d 1296 (11th Cir. 2002); *Quail Creek Prop. Owners Ass'n v. Hunter*, 538 So. 2d 1288, 1289 (Fla. Dist. Ct. App. 1989) ("[N]either the recording of the protective covenant in the public records, nor the possible enforcement of the covenant in the courts of the state, constitutes sufficient 'state action' to render the parties' purely private contracts relating to the ownership of real property unconstitutional."); *Linn Valley Lakes Prop. Owners Ass'n v. Brockway*, 824 P.2d 948, 951 (Kan. 1992) ("The case before us is easily distinguished [from *Shelley*]. The covenant in question places a limitation on the use of the property by the landowners. There is nothing constitutionally impermissible per se in a private agreement restricting signs in a residential neighborhood, and enforcement thereof does not constitute improper state action."); see also *Midlake on Big Boulder Lake Condo. Ass'n v. Cappuccio*, 673 A.2d 340, 342 (Pa. Super. Ct. 1996) (determining that *Shelley* is not applicable to the enforcement of a restrictive covenant absent racial discrimination in a contract between private parties).

II. TOWARD AN APPROPRIATE MODEL: WHY EXISTING THEORIES OF STATE ACTION ARE INADEQUATE IN THE CONTEXT OF COMMUNITY ASSOCIATIONS

A. The Public-Forum Approach Revisited

In *Twin Rivers*, both the Appellate Division and the New Jersey Supreme Court applied the factors developed in *Schmid* and *J.M.B. Realty*, emphasizing notions of public access and invitation.¹³⁹ A public-forum framework proves unworkable in this context, however, because common-interest communities exclude the public by their very nature.¹⁴⁰ Although universities and shopping malls may deserve public status because those spaces encourage public access,¹⁴¹ community associations foster privacy and shut out members of the public.¹⁴² Moreover, the ability to exclude others from privately owned property represents a fundamental property right.¹⁴³ Common-interest communities often foster exclusivity and discourage public access by erecting physical gates or barriers.¹⁴⁴ Such structural elements signal that only property owners and their invited guests are welcome.¹⁴⁵ Thus, an approach emphasizing public invitation appears incongruous with the very essence of common-interest communities.

Residence in common-interest communities also offers retreat from the public sphere. Property owners living in common-interest communities are bound to promote certain common goals.¹⁴⁶ Some homeowners cite heightened safety and security as a reason for residing in a private

139. See *supra* Part I.C.

140. See *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 929 A.2d 1060, 1073 (N.J. 2007).

141. See, e.g., *Robins v. Pruneyard Shopping Ctr.*, 595 P.2d 341, 347 (Cal. 1972); *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590, 591, 595 (Mass. 1983); *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 761, 771 (N.J. 1994); *State v. Schmid*, 423 A.2d 615, 622, 630–31 (N.J. 1980); *Alderwood Assocs. v. Wash. Envtl. Council*, 635 P.2d 108, 116–17 (Wash. 1981).

142. See Josh Mulligan, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard*, 13 CORNELL J.L. & PUB. POL'Y 533, 534 (2004) (referring to common-interest communities as privately owned “simulated spaces,” in which owners “regulate behavior within by exerting the most fundamental property right—the right to exclude.”).

143. See *id.*; see also Rahe, *supra* note 4, at 549 (characterizing the dissolution of the right to exclude as a taking).

144. See Kennedy, *supra* note 7, at 765.

145. See *id.* at 764–65 (noting that a concern for safety has prompted most associations to construct gates or even moats).

146. See Hyatt & Stubblefield, *supra* note 2, at 598–99 (The authors assert that a common-interest community is “one in which the property owners are tied together with a strong common-interest. The interest may be in property owned by the community association of which the owners are all members, or in property owned by the members themselves. In either case, the organization maintains and controls the property, and it embodies the sharing of interest and cohesiveness that comes not only from a legal structure but also from that sharing.”).

community.¹⁴⁷ Community associations often expend considerable resources on security patrols and technology.¹⁴⁸ Prospective buyers may also prefer common-interest communities to ensure and enhance the value of their investment.¹⁴⁹ Because buyers seek out private communities promoting particular values as an alternative to traditional municipalities, such communities defy comparison to a public forum.

B. The Public-Function Theory and Common-Interest Communities

Several commentators argue that common-interest communities are essentially public.¹⁵⁰ Those authors argue that “the functions served by associations and their interdependent relationships with local governments transform their basic nature from private to public, such that they should be regarded as state actors.”¹⁵¹ The public-function theory, articulated in *Marsh* and *Evans*, supports a finding of state action when a private entity undertakes governmental responsibilities traditionally performed by the state.¹⁵² In *Marsh*, Chickasaw resembled other American towns, and in all respects this weighed on the Court’s reasoning.¹⁵³ Similarly, in *Evans* the Court emphasized that operating a community park is particularly a governmental

147. See Kennedy, *supra* note 7, at 765.

148. See *id.* at 766; see also David Dillon, Fortress America, *PLANNING*, June 1994, at 8 (noting an example that “St. Andrews, a gated community in Boca Raton, Florida, spends over \$1 million a year on helicopters and canine patrols”).

149. See Kennedy, *supra* note 7, at 766 (“Concern for property values . . . explains much of the popularity of residential associations . . .”).

150. See, e.g., *id.* at 782–83 (arguing that “residential associations should be treated as state actors” where there is a strong link between an association and the state, and the association has a significant effect on the community); Evan McKenzie, *Reinventing Common-Interest Developments: Reflections on a Policy Role for the Judiciary*, 31 J. MARSHALL L. REV. 397, 404–05 (1998) (discussing the strong tendency to label a common-interest community a public actor when the common-interest community “impacts the lives of many people”); Mulligan, *supra* note 142, at 534–35 (explaining that the same rationale that courts have used to permit certain speech rights in shopping centers can be extended to “other forms of privately-owned public spaces”).

151. Kennedy, *supra* note 7, at 778.

152. See Mulligan, *supra* note 142, at 542–43.

153. *Marsh v. Alabama*, 326 U.S. 501, 503 (1946) (“[T]here is nothing to distinguish [this privately owned town] from any other town and business center except the fact that the title to the property belongs to a private corporation.”). But see Paula A. Franzese & Steven Siegel, *The Twin Rivers Case: Of Homeowners Associations, Free Speech Rights and Privatized Mini-Governments*, 5 RUTGERS J.L. & PUB. POL’Y 729, 749 n.69 (2008) (asserting that because the Twin Rivers community contains “a variety of retail businesses,” it likely qualifies as a state actor under “the *Marsh/Hudgens* test”). Unlike the Twin Rivers Homeowners’ Association, the company-owned town in *Marsh* exercised the “full spectrum” of municipal powers, including law enforcement, leading to the arrest of the Jehovah’s Witness by the town’s deputy sheriff. *Marsh*, 326 U.S. at 503–04. Cf. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568–69 (1972) (finding “no comparable assumption or exercise of municipal functions or power,” as in *Marsh*).

function.¹⁵⁴ And concededly, community associations resemble municipalities by enacting regulations affecting community governance and providing certain services.¹⁵⁵ Some commentators, however, overemphasize the importance of community associations providing municipal services as a basis for equating the associations with state actors.¹⁵⁶ Services such as street paving and garbage collection do not implicate First Amendment rights, and are therefore less significant considerations.¹⁵⁷

Despite similarities between community associations and municipal governments, community associations also display private characteristics that distinguish them from traditional towns.¹⁵⁸ First, community associations are formed by private developers, and their powers stem from recorded covenants that run with the land.¹⁵⁹ Moreover, members are willing to purchase individual lots or units burdened by these covenants.¹⁶⁰ The covenants obligate owners to pay assessments to maintain common property and support the association's activities.¹⁶¹ In essence, by virtue of private contractual agreements, buyer-members agree to abide by association regulations.¹⁶² By contrast, municipality residents do not enter into similar binding agreements.¹⁶³

Because community associations display both private and public characteristics, simply categorizing such organizations as state actors ignores their private character. Although community associations may step into the

154. *Evans v. Newton*, 382 U.S. 296, 299 (1966) (noting that the city's administration of the park amounted to state action).

155. *See Hyatt & Stubblefield*, *supra* note 2, at 635. Community associations offer members services, including road maintenance and trash removal. *Id.* The power that community associations exercise to assess levies is comparable to a municipality's taxing power. *Id.* Further, both community associations and municipalities conduct periodic elections and elect representatives. *Id.*

156. *See, e.g., Franzese & Siegel*, *supra* note 153, at 730–31 (stating that the “trends [in maintenance services and fee collections] lead inexorably to the conclusion that” common-interest communities are more pervasive, but “[t]he *laissez-faire* [sic] approach to . . . regulation . . . affords exceedingly few rights” (first emphasis added)).

157. *See infra* Part III.A. This is a major strength of the revised functional approach discussed below because it considers both the type of activity and whether that activity implicates constitutional rights.

158. *See Hyatt & Stubblefield*, *supra* note 2, at 636–37 (noting that in many ways municipalities are not a “smooth fit” as an analogy to community associations).

159. *See id.* at 637.

160. *See Hyatt*, *supra* note 9, at 6–7.

161. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 (2000); *Hyatt & Stubblefield*, *supra* note 2, at 599–600.

162. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 (2000).

163. *See Hyatt & Stubblefield*, *supra* note 2, at 637. Municipal corporations are forged by a process mandated by state law in which residents vote or petition for municipal status. *Id.* In addition, a municipal corporation represents a political subdivision of a state, and may exercise lawmaking authority delegated to the state. *See id.*

shoes of the state when performing particular functions,¹⁶⁴ recognizing community associations as state actors for all purposes would subject those organizations to wide-ranging constitutional liability.¹⁶⁵

C. The State Entwinement Theory and Common-Interest Communities

Other commentators suggest that community associations may be deemed state actors because of the state's involvement in regulating or creating community associations.¹⁶⁶ Under the holding in *Brentwood Academy*, federal constitutional provisions may apply to a private organization if the organization and the state act interdependently.¹⁶⁷ All fifty states have enacted statutes regulating the creation of condominiums, and several others have statutes addressing other methods of common-interest ownership.¹⁶⁸

164. See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 562 (1972). In curtailing the holding of *Logan Valley*, the Court emphasized functionality as a determinative factor in evaluating state action:

I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly like any other town in Alabama.

Id. at 563 (quoting *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 330–31 (1968) (Black, J., dissenting)).

165. See, e.g., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1149 (The Foundation Press 1978) (“The state action requirement, it is generally thought, furthers two primary purposes. First, by exempting private action from the reach of the Constitution’s prohibitions, it stops the Constitution short of preempting individual liberty—of denying to individuals the freedom to make certain choices, such as choices of the persons with whom they will associate. Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution’s demands.”).

166. See Hyatt & Stubblefield, *supra* note 2, at 659 (noting a significant increase in state involvement in the creation of common-interest communities).

167. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291 (2001).

168. See Hyatt & Stubblefield, *supra* note 2, at 659. A growing minority of states, including Alaska, Arizona, California, Colorado, Florida, Maryland, Minnesota, Nevada, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, Washington, and West Virginia, have enacted statutes regulating the creation of common-interest communities. See, e.g., ALASKA STAT. §§ 34.08.090–300 (2006); ARIZ. REV. STAT. ANN. § 33-1801 (2007); CAL. CIV. CODE §§ 1350–76 (West 2007); COLO. REV. STAT. § 38-33.3-102 (2008); FLA. STAT. ANN. § 720.302 (West 2005 & Supp. 2008); MD. REAL PROP. CODE ANN. § 11B-106 (LexisNexis 2003); MINN. STAT. ANN. § 515B.1-102 (West 2002 & Supp. 2008); NEV. REV. STAT. ANN. § 116.1201 (Lexis Nexis 2007); N.C. GEN. STAT. ANN. § 47F-1-102 (West 2005 & Supp. 2006); OR. REV. STAT. § 94.560(5) (2005); PA. CONS. STAT. ANN. § 5201 (West 2004); VT. STAT. ANN. tit. 27A, § 1-101 (2006); VA. CODE ANN. § 55-508 (2007); WASH. REV. CODE ANN. § 64.38.005 (West 2005); W. VA. CODE ANN. § 36B-1-102 (LexisNexis 2005); see also Steven Siegel, *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government and Land Use Policies that Eliminates the Legal Requirements to Privatize New Communities in the United States*, 38 URB. LAW. 859, 888–89 (2006) (“[The] rise of the territorial community association as the standard template for new community development in the fastest growing areas of the United States is a partial consequence of local government land use policy and, in particular, of privatization decisions made by local government in the land use review process.”).

According to *Brentwood Academy*, a finding of entwinement requires significant interdependence between a private organization and the state.¹⁶⁹ Furthermore, at least one court has found that pervasive entwinement between the association and the state does not exist merely because community associations are subject to state law.¹⁷⁰ Therefore, the entwinement theory is not a workable method in the context of common-interest communities.

D. The Judicial Enforcement Theory and Common-Interest Communities

Some commentators point to the “judicial enforcement” theory announced in *Shelley v. Kraemer* as a mechanism for dissident residents seeking to invalidate community association regulations.¹⁷¹ In *Shelley*, the Court determined that judicial enforcement of a racially restrictive covenant prohibiting the sale of property to non-whites amounted to state action.¹⁷² Because both the buyer and the seller were willing, enforcement of the discriminatory covenant could be attained only through state court action.¹⁷³

The majority of courts have rejected *Shelley* as a basis for applying federal or state constitutional provisions to homeowners’ associations.¹⁷⁴ As one court noted, finding state action through judicial enforcement is predicated on action by the judiciary.¹⁷⁵ Thus, a theory based on judicial enforcement essentially precludes community members from initiating lawsuits claiming constitutional deprivation without prior judicial action.

169. *Brentwood Acad.*, 531 U.S. at 291.

170. *See Brock v. Watergate Mobile Home Park Ass’n*, 502 So. 2d 1380, 1382 (Fla. Dist. Ct. App. 1987) (“The state cannot be implicated in the association’s activities solely because the association is subject to State law.”). *But see* Franzese & Siegel, *supra* note 153, at 754 (asserting municipalities have become increasingly entwined in the formation of common-interest communities: “mounting evidence suggests that the establishment of a homeowners [sic] association is often a requirement of local government land use policy”).

171. *See* Suarez, *supra* note 6, at 756–57.

172. *See Shelley v. Kraemer*, 334 U.S. 1, 18–19 (1948).

173. *See id.* at 19; *see also* Hyatt & Stubblefield, *supra* note 2, at 658. Because some courts have limited *Shelley* to cases involving racial discrimination, while others apply *Shelley* to all discriminatory covenants, it is unclear to what extent *Shelley* applies to community association covenants. *Id.*

174. *See supra* note 138 and accompanying text.

175. *Goldberg v. 400 E. Ohio Condo. Ass’n*, 12 F. Supp. 2d 820, 822 (N.D. Ill. 1998). A condominium or homeowners’ association must obtain a judgment or order enforcing a particular regulation before community members may allege a constitutional violation. *Id.*

III. A REVISED FUNCTIONAL APPROACH RECOGNIZES THE DUAL PRIVATE-PUBLIC CHARACTER OF COMMON-INTEREST COMMUNITIES

A. Scope and Purpose

Existing modes of dealing with the state action problem provide mixed results in the community association context.¹⁷⁶ A revised functional approach amends the public-function theory,¹⁷⁷ and considers foremost the nature of the challenged activity.¹⁷⁸ The analysis inquires as to whether the challenged activity is essentially private or essentially governmental.¹⁷⁹ Restrictions on certain types of political speech and policing by private security forces are examples of governmental activity implicating constitutionally protected rights.¹⁸⁰ This inquiry focuses on the extent that the community association has superseded the state in performing particular functions.¹⁸¹ The revised approach contrasts with the public-function theory by characterizing an association performing a particular governmental function as a state actor for the limited purpose of carrying out that activity.¹⁸²

B. A Revised Functional Approach and United States Supreme Court Precedent

A revised functional theory draws legitimacy from United States Supreme Court precedent. In both *Marsh* and *Evans*, the nature of the activity performed by private entities weighed heavily in the Court's analysis.¹⁸³ According to the Supreme Court in *Lloyd Corp. v. Tanner*, *Marsh* turned on the type of activity performed by the company-owned town: "[i]n effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State."¹⁸⁴ Chickasaw represented a state actor because it employed the "full spectrum" of municipal powers, including law enforcement, which led to the arrest of the Jehovah's Witness in *Marsh*.¹⁸⁵ By contrast, community associations perform only a limited "spectrum" of

176. See *supra* Part II.A-D.

177. See *supra* Part II.B.

178. See *Marsh v. Alabama*, 326 U.S. 501, 507-08 (1946); see also *Evans v. Newton*, 382 U.S. 296, 299 (1966).

179. See *supra* Part I.D.1.

180. See *infra* Part III.C.

181. See *Marsh*, 326 U.S. at 507-09; see also *Evans*, 382 U.S. at 299.

182. See *West v. Atkins*, 487 U.S. 42, 54-57 (1988); see also *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003).

183. See *Marsh*, 326 U.S. at 507-09; see also *Evans*, 382 U.S. at 299; *supra* Part II.B.

184. See *Lloyd v. Tanner*, 407 U.S. 551, 569 (1972).

185. *Marsh*, 326 U.S. at 503-04.

municipal powers.¹⁸⁶ It follows that community associations should be subject to constitutional standards only when performing governmental functions.¹⁸⁷

*C. A Revised Functional Approach Applied to Twin Rivers
and Galaxy Towers*

A revised functional analysis of *Twin Rivers* yields the same conclusion reached by the New Jersey Supreme Court. The conflict between the Committee for a Better Twin Rivers and the Association arose over internal association governance.¹⁸⁸ Committee members sought to post campaign signs, hold informational meetings in the community room, and place advertisements in the community newsletter opposing the current board.¹⁸⁹ Imposing conditions on access to common facilities and regulating content in a community newsletter appear to be private functions rather than governmental functions because both the community room and newsletter represent internal resources designated solely for residents' use.¹⁹⁰ And although regulating sign postings to one sign per lawn may appear analogous to municipal zoning ordinances curbing political speech, the *Twin Rivers* court characterized those regulations as reasonable time, place, and manner restrictions.¹⁹¹

By contrast, the challenged political activity in *Galaxy Towers* was external rather than internal.¹⁹² In that case, the Association engaged in primarily political activities affecting state elections by endorsing particular candidates,

186. See *Bluvias v. Winfield Mut. Hous. Corp.*, 556 A.2d 321, 322 (N.J. 1989) (reasoning that the Association failed the public-function test because the municipality continued to provide essential services including public education).

187. See *West*, 487 U.S. at 56–57; see also *Rosborough*, 350 F.3d at 461. Both the Supreme Court and lower federal courts have recognized privately managed prisons as susceptible to constitutional liability under 42 U.S.C. § 1983. See *West*, 487 U.S. at 57; see also *Rosborough*, 350 F.3d at 461. Implicit in the analysis applicable to privately operated prisons is the notion that private management corporations are deemed public or state actors for the limited purpose of maintaining inmates. See *Rosborough*, 350 F.3d at 461. Otherwise, those private organizations maintain their private character. See *West*, 487 U.S. at 54–57. Similarly, a physician who contracts with the state to provide medical services to inmates represents a state actor for the limited purposes of caring for the incarcerated. See *id.* That physician maintains his private status when he treats other patients outside the prison facility. See *id.* A community association may be deemed a public or state actor when it engages in particularly governmental activity, but it also maintains its private status and avoids constitutional liability when engaged in other activities.

188. See *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 929 A.2d 1060, 1064–65 (N.J. 2007).

189. *Id.*

190. *Id.* at 1073.

191. *Id.* at 1074.

192. *Guttenberg Taxpayers and Rentpayers Ass'n v. Galaxy Towers Condo. Ass'n*, 688 A.2d 156–57 (N.J. Super. Ct. Ch. Div. 1996) (addressing whether the Association could prohibit non-association-endorsed school board candidates from distributing campaign materials in the Galaxy complex).

distributing campaign materials, and organizing get-out-the-vote drives.¹⁹³ A revised functional approach would characterize such electioneering activities as governmental in nature because the Association's campaigning had a demonstrable effect on local politics.¹⁹⁴ Because the Association's voter mobilization activities affected campaigns for public office, this favors recognizing it as a state actor for the limited purpose of performing electioneering activities.¹⁹⁵ Rather than focusing on public access and invitation, this approach offers a practical solution by subjecting the association to limited constitutional liability.¹⁹⁶

IV. CONCLUSION

A scheme for considering community association conduct based on public access and invitation appears incongruent. Developing a new framework to characterize community associations as state actors for narrow purposes both safeguards residents and maintains the integrity of private organizations. A revised functional approach ensures that community members enjoy federal constitutional protections when their associations encroach on governmental roles. At the same time, residential associations assume constitutional liability under limited circumstances. A welcome byproduct is that courts may be more willing to recognize community associations as state actors when associations engage in traditionally governmental activities. A revised model strikes a fundamental balance by preserving the rights of association members and maintaining the force of the state action doctrine.

193. *Id.* at 158–59.

194. *Id.* The court noted the size and composition of voting districts in Guttenberg, asserting that nearly twenty-four percent of registered voters in Guttenberg reside in Galaxy Towers. *Id.* at 158. The court emphasized that “Galaxy voters account for a significant proportion of the total votes cast in any given Guttenberg election.” *Id.* The court also asserted that campaigning in District 6, which included Galaxy, had a historically significant effect on election outcomes: “[e]lection results in the recent past reveal that Association-backed candidates have consistently lost in Districts 1 through 5 by substantial majorities, but have nevertheless won their respective contests by carrying overwhelming majorities in District 6.” *Id.*

195. See Brian Jason Fleming, *Regulation of Political Signs in Private Homeowner Associations: A New Approach*, 59 VAND. L. REV. 571, 597 (2006) (arguing that courts should recognize an exception when evaluating private covenants curtailing “discourse relating to electoral politics”).

196. See TRIBE, *supra* note 165, § 18-2, at 1149 (noting the significance of exempting private conduct from the reach of the Constitution's prohibitions). Restrictions on political speech are often the subject of community association litigation and offer fertile territory for the application of the revised functional approach. Another illustrative example is in private policing. If private security officers were charged not only with enforcing association regulations but also with keeping the peace generally, such officers, arguably, would be constrained by the Fourth and Fifth Amendments because they would be executing the police powers of the state. The community association would be considered a state actor for the purposes of policing. *Cf. Galaxy Towers*, 688 A.2d at 158 (noting that the association's regulations had a significant effect on local politics). Likewise, private policing would significantly affect local policy and therefore, arguably result in the same outcome.

